No. 95-1084

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Respondents,

v.

KATIE JOHN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, CALIFORNIA, COLORADO, NEVADA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions presented are:

Whether the existence of a reserved water right expands the boundaries of federal "public land" as defined in boilerplate language found throughout Title 16 of the United States Code.

Whether the existence of a reserved water right permits federal usurpation of an area traditionally reserved to the states – control of fish harvests in what normally are state waters.

Whether the court of appeals erred in failing to apply the "clear statement" rule to analyze federal preemption of traditional state authority.

Whether the court of appeals erred in analyzing the provisions of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.*, by using a *Chevron* analysis where there were no agency rules or regulations preempting state authority and by granting deference instead to the agencies' litigation position.

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Idaho, California, Colorado, Utah, Nevada, and Wyoming file this brief, Amici Curiae, pursuant to Rule 37.2 of the Supreme Court Rules, in support of the petition of the State of Alaska for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

On its surface, this case appears to concern only the geographic scope of a preference to hunt and fish for subsistence purposes granted exclusively to rural Alaskan residents[1] by Congress in Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), Public Law 96-487, 94 Stat., 2374 (1980), 16 U.S.C. § 3101 *et seq.* By statute, this preference only applies within the federal "public lands" found in Alaska and, thus, would not appear to affect other states. However, directly at issue in that decision is the scope of the "implied reservation of water rights" doctrine – a doctrine of vital significance to western states.

The court of appeals' decision, if allowed to stand, would broaden the objective of the judicially created reserved water rights doctrine. It relies on the mere existence of a reserved water right to expand federal "public land" boundaries and thus authorizes federal usurpation of an area traditionally reserved to the states – control of fish harvests in what normally are state waters. The decision broadly implicates state-federal sovereign relations and promises to upset the traditional balance. Finally, it creates a precedent that seriously

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[1] While the dissent states that this preference is granted only to Alaskan Natives, the dissent is wrong. This preference is granted to all *rural* residents – both Native and non-Native. Native and non-Native Alaskans who live in urban areas were not granted this preference.

violates traditional rules of statutory construction specifically adopted by this Court to preserve that delicate state-federal balance.

The precise question decided by the court of appeals that is the subject of the State of Alaska's Petition is whether the term "public lands" as defined in ANILCA includes navigable waters of Alaska in which the United States now claims an interest by virtue of the reserved water rights doctrine.[2] By ruling that the definition of "public lands" includes all waters in which a federal reserved water right exists, the court of appeals authorized a potentially massive federal intrusion into an area traditionally regulated by the State of Alaska. Because that definition is boilerplate language found in statutes throughout Title 16 of the United States Code, this ruling implicitly threatens western states in which federal reserved water rights have been recognized – expanding the reach of those statutes into state waters.

The decision ignores the firmly established doctrine of clear intent in statutory construction and mis-interprets the federal reserved water rights doctrine as defining the boundaries of federal public land. Rather than applying the "clear statement" rule required by principles of federalism and by this Court, the court of appeals analyzed the statute using a *Chevron*[3] analysis, improperly granting deference to the agencies' newly adopted *litigation* position.[4]

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[2] The court of appeals correctly rejected arguments that the existence of navigational servitude created "public lands."

[3] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[4] Even the application of *Chevron* was improper because the United States' position was wholly unsupported by regulations,

Two aspects of the court of appeals' decision are particularly troubling to the Amici: (1) the method the court of appeals adopted to analyze federal preemption of traditional state authority abrogates the "clear statement" rule; and (2) its unprecedented holding that the court created reserved water rights doctrine can be employed to expand public land boundaries ignores the limited construction such rights are given.

INTEREST OF AMICI IDAHO, CALIFORNIA, COLORADO, NEVADA, UTAH AND WYOMING

Like other western states, each Amici state contains within its borders vast areas of federal lands reserved from the public domain that are potentially subject to an assertion of a federal reserved water right.[5] The court of appeals' decision is particularly disturbing to the Amici, because this is the first court decision that holds that an implied federal reserved water right provides the framework for usurping a state's traditional authority to regulate fishing in state waters – not because the reserved right is *necessary* to effectuate the primary purposes of the federal reservation but because its mere potential[6]

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rulings or administrative practice. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988).

[5] For example, in Idaho, thousands of claimed federal reserved water rights are being adjudicated in a general stream adjudication brought pursuant to the McCarran Act, 43 U.S.C. § 666. *In Re Snake River Basin Adjudication*, Case No. 39576, District Court of the Fifth Judicial District of the State of Idaho.

[6] No federal reserved water rights have ever been asserted or identified in Alaska. In fact, unlike water in the arid western states, water is so plentiful in Alaska that its former Director of the Water Resources Department of Natural Resources

existence transforms state waters into federal public lands, creating jurisdiction for the agency to assert that authority.

In its ruling, the court of appeals determined the meaning of the phrase used to define "public lands" in ANILCA – "lands, waters and interests therein." This definition of public lands defines the geographic scope of all fifteen titles in ANILCA, not just the scope of Title VIII.[7] In Title VIII, "public lands" ultimately define the balance struck by Congress with respect to the Secretary's authority and the State of Alaska's traditional fish and wildlife management authority on Alaska's navigable waters. However, it is also boilerplate language used in hundreds of statutes collected in Title 16 of the United States Code.[8] Thus, this Court should review the court of

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published a booklet promoting exportation of Alaska's water to southwestern states and later testified before the Nevada Legislature concerning marketing its water. Ric Davidge, Alaska Water Imports: A Discussion Paper of Key Issues Involved in Moving Bulk Quantities of Water from Alaska to the Southwestern States and Mexico Using Marine Transport 3 (July 1993) (on file with State of Alaska Department of Natural Resources); 2 *Water and Water Rights*, § 16.04(c)(9) (1991 ed. & Supp. 1994).

[7] Title VIII which is at issue in this case is only one title out of fifteen (15) titles in ANILCA. Section 102 applies the public lands definition to the entire Act, except Title IX and Title XIV. Title IX implements ANCSA and the Alaska Statehood Act, 72 Stat. 339. Title XIV amends ANCSA and related provisions. In those two titles, the definition of public lands is the same as it is in ANCSA and in the Alaska Statehood Act. *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396, 1406 (1987).

[8] *E.g.*, 16 U.S.C. §§ 90, 90B(a), 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d(a), 410j, 410o, 410p(a),

appeals' decision determining the meaning of this language. If such boilerplate language satisfies the "clear intent" rule by demonstrating Congressional intent to usurp traditional state regulatory authority to manage fish harvests by its citizens in state waters, this marks an unmistakable and chilling departure from traditional rules of statutory construction with very real implications for each state. This Court should review this departure. Likewise, it virtually transforms the traditional definition of "public lands" with obvious implications for each state.

Like other states, Amici have a significant interest in preserving the "clear intent" doctrine because it requires proponents of an intrusion into an area of traditional state authority to plainly demonstrate Congress' clear and manifest intent to act in that manner. The clear intent doctrine was designed to preserve the delicate state-federal balance in areas where the state has traditionally exercised management or regulatory authority. Management of fish and game, and particularly of fish and game harvests, is traditionally managed by the states.

In this case, the Amici are clearly affected if the Court should allow the court of appeals' decision to stand, because its decision relies on a doctrine of implication (federal reserved water rights) to justify intruding upon an area of traditional state authority. The State of Alaska's Petition should be granted.

410bb(b)(1), 410ff-1(a), 410gg, 410gg-1(a), 410gg-2(b), 410ii-3(a), 410jj-3(c), 410mm-2(b), 410rr-2, 410rr-7(c), 459d-3(a), 459e-1(a), 459h-1(a), 459i-1, 459j-1, 460l-8(a), 460l-9(a)(1), 460-10a, 460l-10b, 460m-3, 460m-9(a), 460m-16(a), 460p-2(a), 460q-2(a), 460r-2(a), 460v-7, 460z-6(a), 460z-13, 460aa-12, 460bb-3(a), 460cc-1(a), 460ee(c)(1), 460kk(c)(1), 460ww(b).

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Ignored The Clear Intent Doctrine And Improperly Relied On *Chevron* To Analyze This Statute

When Congress legislates in an area traditionally regulated by the states, this Court starts with the assumption that the historic police powers of the states are not to be superseded unless that is the clear and manifest purpose of Congress; this is called the "clear intent" doctrine. *E.g., Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2482 (1991). This presumption assures that the federal-state balance "will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Pkg. Co.*, 430 U.S. 519, 525 (1977) *quoting United States v. Bass*, 331 U.S. 218, 230 (1947). The primary issue before the court of appeals in this case was whether Congress intended to assume management of subsistence fish harvests in some navigable waters belonging to the State of Alaska. Those harvests had always been managed by Alaska, just as in-state fish harvests are managed by each Amici state and other states in state waters. The issue, therefore, clearly implicates an area traditionally regulated by the states. The court of appeals should have examined the statutory language to determine whether that intent was clearly manifested and not simply implied.

The court of appeals did not acknowledge this important statutory presumption. Instead, it failed to analyze the issue using the "clear intent" doctrine at all and adopted a *Chevron* analysis in its place, even applying that analysis incorrectly.

> We consider two questions when we review an agency's construction of a statute that it administers. *Chevron U.S.A. v. Natural Resources*

> *Defense Council*, 467 U.S. 837, 842 (1984). First, we consider "whether Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history." *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 963 (9th Cir. 1986) (quoting *Chevron*, 467 U.S. at 842). Second, if Congress has not directly spoken to that precise question, we consider "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

State of Alaska v. Babbitt, No. 94-35480, 1995 WL 749795, at *2 (9th Cir. (Alaska) Dec. 19, 1995).

While the court of appeals correctly ruled that Congress *expressed* no intent to usurp traditional state management authority on all navigable waters in Alaska based on either an exercise of its Commerce powers or the navigational servitude, it failed to comprehend the implications of that ruling. In reviewing ANILCA's language and legislative history, the court of appeals correctly ruled it had no clear direction, stating:

> ANILCA itself refers only to "lands, waters, and interests therein, the title to which is in the United States." *It makes no reference to navigable waters. The legislative history is also unhelpful, containing only a single reference to navigable waters.* See 126 Cong. Rec. 20278-80 (Nov. 12, 1980) (statement of Rep. Udall).

Id. (Emphasis added.)[9] It never addressed Congress' express recognition of continued state management found in ANILCA.

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[9] Significantly, the court of appeals correctly rejected Representative Udall's statements as having little weight:

> Congressman Morris Udall inserted a statement in the Congressional Record that ANILCA's definition

Congress included an express recognition of state management authority when it wrote:

> (a) Nothing in this Act is intended to enlarge or *diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands* except as *may* be provided in [title VIII of this Act], or to amend the Alaska constitution.
>
> (b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to *enlarge* or diminish the responsibility and authority of the Secretary over the management of the public lands.

16 U.S.C. § 3202. (Emphasis added.) This is an express statement that in enacting ANILCA, Congress intended to build upon legal relationships established by state law, supplanting state law only to the extent actually provided in Title VIII. If the court of appeals had analyzed Title VIII of ANILCA under the correct standard, this recognition by the court of appeals that neither the statutory

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of public lands included all navigable waters throughout Alaska. See 126 Cong. Rec. 29260, 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). He did so, however, after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it. His views deserve little weight. *See NLRB v. Fruit & Vegetable Packers & Warehouseman* [sic], 377 U.S. 58, 66 (1964) ("these statements could represent only the personal views of these legislators, since [they] were inserted in the Congressional Record after passage of the Act"). We reject the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.

Id.

language nor the legislative history demonstrates Congress' clear intent to usurp traditional state management authority should have ended the inquiry.

However, the court of appeals went on to say, "[l]acking clear direction, we must decide whether the *federal agencies' conclusion* that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." *Id.* (Emphasis added.) Instead, the court of appeals improperly decided to *defer* to the agencies' *litigation* position where the agencies belatedly decided to rely on the reserved water rights doctrine to expand their authority to manage Alaska's fish in state waters.

2. The Court Of Appeals *Chevron* Analysis Was Erroneous

Even the court of appeals' application of *Chevron* was improper because the United States' position was wholly unsupported by regulations, rulings or administrative practice; it was a belatedly adopted litigation position. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988). As this Court ruled in *Bowen* where the federal agency contended its litigation position was entitled to deference under *Chevron* and its progeny:

> We have *never* applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute v. Camp*, 401 U.S. 617, 628, 91 S. Ct. 1091, 1097, 28 L. Ed. 2d 367 (1971);

> *cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 245-246, 9 L. Ed. 2d 207 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency [orders]"). . . . . *Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.* *Id.* at p. 213. (Emphasis added.)

The court of appeals recognized this was a litigation position in its decision and acknowledged that:

> Until the second oral argument before the Federal District Court of Alaska, the federal agencies had consistently maintained that neither the federal reserved water rights doctrine nor the navigational servitude were interests in water, title to which was in the United States, expanding the definition federal public lands under ANILCA.

Babbitt, at *2. Neither agency had promulgated rules or regulations extending management onto any navigable waters in Alaska or asserting navigable waters were "public lands." Therefore, the court of appeals' decision is directly contrary to this Court's rulings. An agency's litigation position, unsupported by agency rules or regulations is simply not entitled to deference under the *Chevron* analysis or under any other analysis. This departure from precedent is significant. Therefore, this Court should accept the State of Alaska's Petition.

3. The Court Of Appeals' Decision Ignores This Court's Decision That A Reserved Water Right Can Only Be Recognized Where, Without It, The Primary Purposes For The Federal Reservation Would Be Defeated.

The federal reserved water right doctrine is a judicial creation; therefore, this Court has limited its scope. The mere reservation of property by Congress under the Property Clause is not sufficient to establish the existence

of a federal reserved water right. Rather, this Court has consistently recognized that a federal reserved water right can *only* be recognized where the primary purposes for the federal reservation would be *entirely defeated* without the water. *United States v. New Mexico*, 438 U.S. 696, 700 (1978). Determining its existence requires a court to analyze carefully the primary purposes for the reservation *and* to determine the absolute necessity for the reserved water right.

In this case, neither the district court nor the court of appeals had any evidence before them supporting a determination that the primary purposes for the creation of the Wrangell-St. Elias[10] conservation unit was to protect subsistence fishing for rural Alaskans. In fact, it was not; the primary purpose for its creation was for land management. This Court analyzed the same definition section at issue in this case and said:

> *The subsistence-protection provisions of the statute must be viewed in the context of the Act as a whole.* ANILCA's *primary purpose was to complete the allocation of federal lands in the State of Alaska,* a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA. To this end, it provided for additions to the National Park System, National Wildlife Refuge System, National Forest System, National Wild and Scenic Rivers System, and National Wilderness Preservation System, and also provided for the establishment of a National Conservation Area and National Recreation Area, within the State of Alaska. . . . The Act also provided for a means to facilitate and expedite the conveyance of federal lands within the State to the State of Alaska under the

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[10] The fishing rights asserted in the District Court were located in the Wrangell-St. Elias conservation unit.

> Statehood Act and to Alaska Natives under ANCSA. . . . [T]he same definition of "public lands" which defines the scope of Title VIII applies as well to the rest of the statute. . . .

Amoco Production v. Gambell, 480 U.S. 531, 1406-07 (1987) (emphasis added).

Likewise, neither the district court nor the court of appeals had any evidence establishing that the primary purpose of a reservation would be *"entirely defeated"* without the claimed reserved water and made no such finding.

Because a reserved water right intrudes upon an area of traditional state regulation, the federal reserved water rights doctrine is narrowly construed by this Court. A court is required to strictly scrutinize the primary purposes for the reservation in question to define the scope of the reserved water right, if it exists at all, and then the right is recognized in "only that amount of water necessary to fulfill the purposes of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Specifically, the existence of a reserved right depends upon the conclusion that the purpose of the reservation would be *entirely defeated without the claimed water*. *New Mexico*, 438 U.S. at 700 (1978); *United States v. Jesse*, 744 P.2d 491, 494 (Colo. 1987). In *New Mexico*, Chief Justice Rehnquist wrote that:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*.

New Mexico, 438 U.S. at 700 (1978) (emphasis added). This careful examination is required both because the reservation is implied, rather than express, and because Congress continues to defer to state water law in the field of federal-state jurisdiction over water allocation. *Id.* at 702-03.

Implicit in the necessity requirement is that a reservation alone is not sufficient. Indeed, the United States Forest Service recently argued to the Court of Appeals for the Tenth Circuit that where it could promote the primary purposes for the reservation *without* the assertion of a reserved water right, it would not assert the right.

> The Forest Service argues that it has numerous other ways to protect wilderness water values in addition to seeking federal reserved water rights under the Wilderness Act. It has provided a list of these other methods and an examination of possible threats to wilderness water values. See second report, at 10-19.

Sierra Club v. Yeutter, 911 F.2d 1405, 1412 (10th Cir. 1990). The Tenth Circuit accepted this position, rejecting the Sierra Club's argument that the Forest Service had a duty to assert a reserved water right. The Amici agree with both the Tenth Circuit and with the United States Forest Service. The court of appeals' decision in this case, however, would essentially nullify this Court's requirement that necessity be established before the reserved water right can be recognized.

Amici are directly affected by a ruling that ignores this Court's requirement for necessity and thus urge Alaska's Petition be accepted.

4. The Court Of Appeals' Decision Fundamentally Changes The Traditional Notion Of A Federal Reserved Water Right.

The court of appeals found that a federal reserved water right was an "interest in water" such that it defined the geographic scope of "public lands." Based on this conclusion, the court of appeals determined that Congress intended to expand federal authority to manage fish in navigable waters within Alaska. This determination fundamentally changes the traditional notion of a federal reserved water right. The federal reserved water right does not define geographic boundaries. It is not a land management tool nor the justification for managing fish. It is a usufruct – the right to use water only – it is not a right to possess the water column.

The holder of a non-consumptive water right is not entitled to withdraw water from the stream for consumptive purposes; rather the water right is simply intended to prevent other appropriators from depleting the waters below a protected level in any area in which the non-consumptive right applies. *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984). Thus, while a federal instream flow right may be a property interest, it is more similar to a negative easement and is clearly not akin to title. Rather, the United States is merely asserting the right to exclude others, junior in time, from appropriating that flow.

The court of appeals ruled that by virtue of the federal reserved water rights doctrine, all waters appurtenant to federally reserved or withdrawn lands are "public lands" where that water right exists. The court of appeals confuses a right to use water with ownership of the water column. Given the nature of the reserved waters doctrine, it is inconceivable that Congress

intended to employ it as a geographic delineator of public land boundaries. The reserved waters doctrine certainly may involve the right to use the waters of a navigable stream, yet the water column itself, the corpus of a navigable stream, never becomes, or in the nature of things, *can become* the subject of fixed appropriation or exclusive dominion. "Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein." *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

Therefore, because the court of appeals' decision threatens to fundamentally alter the effect of a reserved water right, clearly affecting all western states, Amici urge the Court to review this decision and to narrowly construe the nature and effect of a reserved water right.

5. The Court Of Appeals Overlooked The Requirement That Title To The Interest Is Necessary To Invoke ANILCA's Definition Of "Public Lands."

The central issue before the court of appeals was whether "public lands" as defined in § 102 of ANILCA includes those waters in Alaska subject to an unasserted federal reserved water right. 16 U.S.C. § 3102. Contrary to the court of appeals' decision, essential to that determination is whether the United States has "title" to an interest in waters by virtue of the reserved water right. The "public lands" definition is central to any analysis. "Public lands" are defined in ANILCA § 102 as follows:

> (1) The term "land" means lands, water and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980 are Federal lands, except –
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
>
> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act . . . which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act. . . .

16 U.S.C. § 3102(1)-(3) (citations omitted).

Although it recognized the significance of "title" when it analyzed the public lands definition against the navigational servitude,[11] the court of appeals failed to

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[11] The court of appeals wrote:

> We have held that the navigational servitude is not "public land" within the meaning of ANILCA because the United States *does not hold title to it. City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). Contrary to the district court's opinion, the Supreme Court has not limited that holding. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Court rejected the assertion that the Outer Continental Shelf (OCS) is not "Federal land" because the United States does not

even examine it in the context of the federal reserved water right to determine if it amounted to a titled interest in water. Instead, it misconstrued this section to mean that simply having a property interest is sufficient to make a land or water a public land for ANILCA purposes. It recognized its own difficulty in its conclusion where it stated:

> If we were to adopt the state's position, that public lands exclude navigable waters, we would give *meaning to the term "title" in the definition of the phrase "public lands."* But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.

Babbitt, at *5. It is wrong. Title is essential to Congress' definition in this context.

A. This Court Has Affirmed That The Public Lands Definition In ANILCA Requires The Existence Of Title Interest

The court of appeals missed the issue. It is not whether there exists a property interest but whether that

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hold title to it. *Id.* at 548 n.15. The Court explained in dictum that, while the United States may not hold "title" to the OCS, it was hesitant to conclude that the United States did not have "title" to "any interests therein." *Id.* But its dictum indicates only that, while the United States may not hold title to land, it may hold title to interests (e.g., mineral rights) in that land. For this reason, we reject the argument that the navigational servitude is an "interest . . . the title to which is in the United States," such that all navigable waters are public lands within the meaning of ANILCA.

Babbitt, at *4 (emphasis added).

property interest amounts to "title." There are many property interests which fall short of title interests such as usufructuary rights, negative easements, or restrictive covenants. The federal reserved water right is one such right.

As both this Court and even the court of appeals have held, "public lands" are defined in ANILCA to be lands, waters and interests therein, situated in Alaska, the *title* to which is in the United States after the date of enactment of ANILCA. *Amoco Production v. Gambell*, 480 U.S. 531 (1987); *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). Because Congress explicitly tied the definition of public lands to title and this Court has recognized this link; title is an essential element of this definition. Thus, the court of appeals' failure to analyze the type of interest created when a federal reserved water right is recognized and whether it amounts to "title" is fatal to its analysis.

B. Federal Reserved Water Rights Are Not Title Interests

In this context, the United States clearly does not have title to any federal reserved water rights. Whether it is a property interest is ultimately irrelevant. While the United States acquires a vested right to use water upon establishment of a federal reserved water right, it does not have title to the water column. In fact, in this case, the United States never actually affirmatively asserted it has "title" to the water right, and even at oral argument specifically conceded it did *not* have title and stated as follows:

> It is clear that the federal reserve water rights is a – and reserve rights generally are an interest in property to which a party is entitled. While

> there technically is *not a title interest, it is a use interest,* it is still a matter of property interest.

Transcript of Proceedings, Oral Argument on Cross-Motions for Summary Judgment, March 18, 1994; p. 36. The United States calls the right a property right but never suggested it had "title" to the right.

"Title" is defined in *Black's Law Dictionary* 1331 (5th Ed. 1979) as follows:

> Title is the means whereby the owner of lands has just possession of his property. The union of all elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land, also the evidence of such ownership.

"Interest" is defined in *Black's Law Dictionary* at 729 as something "less than title."

No federal or state case describing the federal reserved water rights doctrine has ever suggested that the United States has "title" to the water of a stream.

The statutory context is also important. "Land" is defined in more general terms, encompassing "interests." 16 U.S.C. § 3102(1). When Congress defined the narrower term, "federal lands," Congress further modified it by using "title." 16 U.S.C. § 3102(2). Congress did not say that federal lands are "lands to which the United States hold an interest." It provided that "federal land means lands the *title* to which is in the United States. . . . " 16 U.S.C. § 3102(2). Congress was careful that in creating federal duties and responsibilities, these duties be limited to avoid encroaching on the authority of the State of Alaska over non-federal lands. *See* 16 U.S.C. §§ 3202(a), (b).

The court of appeals is, therefore, wrong. The "title" requirement is not superficial; it has meaning. Congress knew very well what it was doing and meant what it said

– "title" modifies "interest." When Congress includes particular language in one section of a statute but does not use the same language in another, this Court presumes it acted intentionally. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). The differences are not ascribed to simple mistake or inadvertence. *Russello v. United States*, 646 U.S. 16, 23 (1983).

Therefore, the statute, its structure, and the case law demonstrate that title and interests are not synonymous. The United States must establish its title to the water column. It cannot do so, and this Court should accept the State of Alaska's Petition.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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